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By: Deputy Clerk

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA

FRANCISCO GARCIA individually, on behalf of his minor child SILVARIO GARCIA and all others similarly situated

Plaintiff(s),

vs.

MICROSOFT CORPORATION

Defendant.

Case No. 1 07-CV-2363 -CC

MICROSOFT CORPORATION'S NOTICE OF REMOVAL UNDER 28 U.S.C. § 1441(a) AND THE CLASS ACTION FAIRNESS ACT

TO THE CLERK OF THE ABOVE-ENTITLED COURT AND TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that Defendant Microsoft Corporation ("Microsoft") hereby removes the above-captioned action from the Superior Court of Fulton County, Georgia, File No. 2007 CV 138898, to the United States District Court for the Northern District of Georgia, Atlanta Division. In support thereof, Microsoft states as follows:

1. On August 23, 2007, Plaintiff commenced this action in the Superior

Court of Fulton County, Georgia by filing a Complaint captioned *Francisco Garcia, individually, on behalf of his minor child Silvario Garcia and all others similarly situated v. Microsoft Corp.*, Civil Action File No. 2007 CV 138398. A copy of the Complaint is attached hereto as part of Exhibit A.

2. Plaintiff served a copy of the Complaint on Microsoft on August 29, 2007.

3. In his Complaint, Plaintiff claims that Microsoft fraudulently induced, converted funds from, and purposefully deceived Plaintiff and the proposed class members, engaged in deceptive trade practices, and was unjustly enriched by: (1) "enter[ing] into unenforceable contracts for XBOX Live [sic] subscription contracts of any length, and accompanying automatic XBOX Live [sic] subscription renewal contracts of any length, under the well-established 'Infancy Doctrine' found in O.C.G.A. §13-3-20;" and (2) "improperly charg[ing] initial XBOX Live [sic] subscription fees and subsequent automatic XBOX Live [sic] subscription renewal fees to adult Class Members without securing written contracts with adult Class Members in violation of the Statute of Frauds, found in O.C.G.A. §13-5-30(5)." Compl. ¶ 22.

4. Plaintiff brings his claim on behalf of himself and two proposed classes alleged as follows:

> Representative Plaintiffs [sic] bring this class action individually and on behalf of all others similarly situated (each such plaintiff is referred to herein as a "Class Member" and collectively, the Class Members are referred to herein as the "Class") who have been charged fees for XBOX Live [sic] subscriptions of any length, with accompanying automatic XBOX Live [sic] subscription renewals of any length, where such contracts have been entered into by minor children in violation of O.C.G.A. §13-3-20.

Compl. ¶ 13.

> Representative Plaintiff bring[s] this class action individually and on behalf of all others similarly situated who have been charged fees for XBOX Live [sic] subscriptions of any length, with accompanying automatic XBOX Live [sic] subscription renewals of any length, where such multiple-years contracts with adult Class Members are not in writing as required under the applicable Statute of Frauds, found in O.C.G A. §13-5-30(5).

Compl. ¶ 14.

5. This Court's removal jurisdiction is invoked under 28 U.S.C. § 1441 and the Class Action Fairness Act of 2005, Pub. L. 109-2, 119 Stat. 4 (2005) ("CAFA"), codified in scattered sections of Title 28 of the United States Code. CAFA became effective on February 18, 2005, and applies to any civil action commenced on or after its date of enactment. Because this action was commenced on August 23, 2007, CAFA applies to it.

6. Congress enacted CAFA to expand federal jurisdiction over proposed class actions. CAFA provides that a class action against a non-governmental entity may be removed to federal court if: (1) the number of proposed class members is

not less than 100; (2) any member of the proposed plaintiff class is a citizen of a state different from any defendant; and (3) the aggregate amount in controversy exceeds $5 million, exclusive of interest and costs. *See* 28 U.S.C. § 1332(d)(2), (d)(5) & § 1453(b); *see also Lowery v. Alabama Power Co.*, 483 F.3d 1184, 1202-03 (11th Cir. 2007). In addition, 28 U.S.C. § 1446 sets forth certain procedural requirements. As discussed below, all of the requirements for removal are satisfied here.

CLASS SIZE

7. CAFA's first requirement, that the proposed class contain at least 100 members, 28 U.S.C. § 1332(d)(5), is satisfied here. This proposed class action is brought on behalf of: (1) all persons who have been charged fees for Xbox LIVE subscriptions of any length, with accompanying automatic Xbox LIVE subscription renewals of any length, where such contracts have allegedly been entered into by minor children in violation of O.C.G.A. §13-3-20, Compl. ¶ 13; and (2) all persons who have been charged fees for Xbox LIVE subscriptions of any length, with accompanying automatic Xbox LIVE subscription renewals of any length, where such multiple-year contracts with adult Class Members are allegedly not in writing, Compl. ¶ 14. Microsoft's records show that there are at least 100 subscribers to Xbox LIVE in Georgia with accompanying automatic

Xbox LIVE subscription renewals where the subscribers have been charged subscription fees and the subscription, together with an automatic renewal, would exceed one year.

DIVERSITY OF CITIZENSHIP

8. CAFA's second requirement, that any one member of the proposed class be a citizen of a state different from any defendant, 28 U.S.C. § 1332(d)(2), is also satisfied here. Plaintiff alleges that he is a resident of Georgia. Compl. ¶ 2. Microsoft is incorporated in and has its principal place of business in the State of Washington. Compl. ¶ 4. Diversity of citizenship thus exists between at least one proposed class member and the defendant.

9. The complete diversity between the named parties not only satisfies the minimal diversity-of-citizenship requirement under CAFA, but also precludes the applicability of the "local controversy" or "home state" exceptions in 28 U.S.C. § 1332(d)(3) and § 1332(d)(4).

AMOUNT IN CONTROVERSY

10. CAFA's third requirement, that the aggregate amount in controversy exceeds $5 million, exclusive of interest and costs, 28 U.S.C. § 1332(d)(2), is satisfied here as well. Although Microsoft disputes liability and damages, it is evident that the damages Plaintiff claims for himself and the proposed class exceed

$5 million.

11. Plaintiff seeks various forms of relief, including "punitive damages, treble damages, [and] compensatory damages." Compl. ¶ 46. Microsoft's records show that Georgia subscribers to Xbox LIVE subscriptions with accompanying automatic Xbox LIVE subscription renewals, where the subscription, together with an automatic renewal, would exceed one year, of any length have paid over $5 million to Microsoft for such subscriptions, exclusive of interest and costs. Plaintiff therefore seeks an amount that exceeds the $5 million CAFA threshold, exclusive of interest and costs.

PROCEDURAL REQUIREMENTS

12. The procedural requirements set forth in 28 U.S.C. § 1446 are also satisfied here. Section 1446(a) requires the removing party to file a notice of removal "in the district court of the United States for the district and division within which such action is pending," which Microsoft satisfies by this filing.

13. Section 1446(a) also requires a removing party to provide to the district court a copy of all process, pleadings, and orders served on any defendants in the state action, which Microsoft satisfies as well (all such documents are attached as Exhibit A).

14. As required by 28 U.S.C. § 1446(b), Microsoft is timely filing this

Notice of Removal within thirty days of August 29, 2007, the date on which Plaintiff served Microsoft with a copy of the Complaint.

15. Finally, Microsoft will contemporaneously file an appropriate notice, a copy of which is attached hereto as Exhibit B, with the Superior Court of Fulton County, Georgia, and will serve on Plaintiff's attorneys a true and correct copy of this Notice of Removal, thus satisfying the remaining requirements of 28 U.S.C. § 1446(d).

16. In conclusion, Microsoft respectfully submits that: (1) CAFA applies to this action because Plaintiff filed his Complaint after CAFA's effective date; (2) the proposed class contains at least 100 members; (3) at least one member of the proposed class is a citizen of a state different from Microsoft's state of incorporation and principal place of business; (4) the aggregate amount in controversy exceeds $5 million, exclusive of interest and costs; and (5) the procedural requirements for removal under 28 U.S.C. § 1446 are met. For these reasons, this action is properly removed to this court.

DATED this 27th day of September, 2007

JOHN E. STEPHENSON, JR.
Georgia Bar No. 679825
KRISTINE MCALISTER BROWN
Georgia Bar No. 480189

DERIN BRONSON DICKERSON
Georgia Bar No. 220620

ALSTON & BIRD LLP
1201 West Peachtree Street
Atlanta, GA 30309-3424
Telephone: (404) 881-7000
Facsimile: (404) 881-7777

Counsel for Defendant Microsoft Corporation

OF COUNSEL:
CHARLES B. CASPER (*pro hac vice admission pending*)
PETER BRESLAUER (*pro hac vice admission pending*)

MONTGOMERY, MCCRACKEN, WALKER, & RHOADS, LLP
123 South Broad Street
Philadelphia, Pennsylvania 19109
Telephone: (215) 772-1500
Facsimile: (215) 772-7620

CERTIFICATE OF SERVICE

I hereby certify that on this the 27th day of September, 2007, a copy of **DEFENDANT MICROSOFT CORPORATION'S NOTICE OF REMOVAL UNDER 28 U.S.C. § 1441(a) AND THE CLASS ACTION FAIRNESS ACT** has been served upon the following by United States mail, postage prepaid:

Christopher C. Taylor
Hernan Taylor & Lee, LLC
990 Holcomb Bridge Road, Suite 3
Roswell, Georgia 30076

Derin Dickerson